

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-513 964-D1
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Theodore L. LEVY

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1724

Theodore L. LEVY

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 7 June 1967, and Examiner of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman's documents for six months upon finding him guilty of misconduct. The specification found proved alleges that while serving as a boatswain on board the SS DURANGO VICTORY under authority of the document above described, on or about 25 May 1967, Appellant wrongfully assaulted and battered the chief mate of the vessel.

At the hearing, Appellant elected to act as his own counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of the chief mate and of a second witness, one Manuel Batista, an ordinary seaman.

In defense, Appellant offered in evidence the testimony of the chief engineer of the vessel, who was not an eyewitness to anything, and his own testimony.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of six months.

The entire decision was served on 3 August 1967. Appeal was timely filed and was perfected, with permission, on 23 July 1968.

FINDINGS OF FACT

On 25 May 1967, Appellant was serving as boatswain on board SS DURANGO VICTORY and acting under authority of his document.

On the date in question Appellant assaulted and battered the chief mate of the vessel.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner.

Appellant essentially asserts that:

- (1) the Examiner was in error in giving more credence to the evidence against him than to the evidence for him; and
- (2) that racial prejudice shown in the course of evidence given against him was the cause of the Examiner's decision

APPEARANCE: Appellant, pro se.

OPINION

I

Appellant points out that there are discrepancies in the testimony of the two witnesses who appeared against him, and argues that his version of events should therefore have been accepted by the Examiner. The discrepancies are minor and are no more than what is expectable when two people testify as eyewitnesses of a scene of violence, especially when one of them is a direct participant in the action.

Nevertheless, this resolves to a question of credibility. Assessment of credibility is a function of the Examiner as trier of facts. Unless there is such an intrinsically unbelievable quality in the testimony or evidence on which he relies as to make his acceptance of it arbitrary and capricious, his findings will not be disturbed. The testimony upon which the Examiner relied is not so inherently incredible that it must be said on review, as a matter of law, that the Examiner necessarily should have rejected it.

II

Appellant's second point is actually two-fold. In one way he is saying that the witness who was the victim of the assault and battery found proved was motivated by racial prejudice, as evidenced by the insulting epithets which, in Appellant's testimony, that witness used to him; and therefore the testimony of

this witness must be rejected.

This is still a question of credibility. There was testimony that the language attributed to the witness by Appellant was not used. The Examiner did not find that the alleged epithets were used, and his fact finding will not be disturbed.

The other thrust of Appellant's argument is that he was subjected to gross provocation. If he were to have been found provoked by insulting language, there would still be no justification for an assault and battery, only a matter in mitigation or extenuation. But, it is repeated, the Examiner did not so find, and on review there is no sufficient reason to add to his findings.

CONCLUSION

No sufficient reason has been given to disturb the findings of the Examiner as the trier of facts. No reason has been offered to show that the Examiner's order is unreasonable.

ORDER

The order of the Examiner dated at San Francisco, California, on 7 June 1967, is AFFIRMED.

W. J. SMITH
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 24th day of September 1968.

INDEX (LEVY)

Assault (including battery)
Provocation not a defense

Examiners
Conflicts in testimony resolved by

Mitigating circumstances
Provocation, assault case

Provocation
Assault

Testimony
Conflicting to be weighed by examiner
Discrepancies, minor

Witnesses
Credibility judged by examiner